No. 02-361

OCT 7 2002

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

UNITED STATES OF AMERICA, *et al.*,

Appellants,

—v.—

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT COURT OF PENNSYLVANIA

RESPONSE OF APPELLEES MULTNOMAH COUNTRY PUBLIC LIBRARY, *et al.*, TO APPELLANTS' JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the court below correctly held that CIPA (the Children's Internet Protection Act) violates the First Amendment by inducing public libraries to install Internet programs that block a vast amount of constitutionally protected speech?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following statements:

1. The parent corporation of respondent PlanetOut Corporation, which has been dissolved and merged into Online Partners.com, Inc., is PlanetOut Partners, Inc.

2. More than 10% of PlanetOut Partners, Inc., shares issued and outstanding are owned by JP Morgan Partners and affiliated entities of JP Morgan Partners.

3. The following respondents do not have parent companies nor do any publicly held companies own 10% or more of their stock: Multnomah County Public Library; Connecticut Library Association; Maine Library Association; Santa Cruz Public Library Joint Powers Authority; South Central Library System; Westchester Library System; Wisconsin Library Association; Mark Brown; Sherron Dixon by her Father and Next Friend Gordon Dixon; James Geringer; Marnique Tynesha Overby by her Aunt and Next Friend Carolyn C. Williams; Emmalyn Rood by her Mother and Next Friend Joanna Rood; William J. Rosenbaum; Carolyn C. Williams; Quiana Williams by her Mother and Next Friend Sharon Bernard; Afraidtoask.Com; Alan Guttmacher Institute; Ethan Interactive, Inc. D/B/A Out In America; Naturist Action Committee; Wayne L. Parker; Planned Parenthood Federation Of America, Inc.; Planetout.Com; Jeffery Pollock; and Safersex.org.

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Pursuant to Rule 18.6 of the Rules of this Court, appellees Multnomah County Public Library, *et al.*, respectfully submit this response to the government's jurisdictional statement.

INTRODUCTION

The government asks this Court to consider and reverse the unanimous decision of a three-judge court striking down the Children's Internet Protection Act (CIPA), which imposes unprecedented speech restrictions on local libraries around the country that provide free Internet access to patrons. Based on extensive findings of fact from an eight-day trial, the lower court correctly held that CIPA induces public libraries to violate the First Amendment. The statute requires libraries to install blocking programs that inevitably block a substantial amount of protected speech for adults and minors. No blocking program offers content categories that are limited -- or indeed tied in any way -- to CIPA's legal definitions of obscenity, child pornography, or material that is "harmful to minors." There is no judicial involvement in the programs' decisions about which Web sites to block, and the programs' providers refuse to disclose their block lists to libraries. In contrast to the restrictive and ultimately ineffective blocking programs mandated by CIPA, libraries have devised a number of less restrictive ways to assist patrons who wish to avoid content they find offensive. For these reasons, CIPA fails the strict scrutiny required of content-based speech restrictions, and imposes an unlawful prior restraint. Because CIPA threatens to distort the democratic, speech-enhancing qualities of both public libraries and the Internet, the three-judge court correctly enjoined its enforcement.

The lower court judgment rests securely on this Court's holdings in prior cases, and appellees believe it should be summarily affirmed. Because this case involves an Act of Congress, and an area that the Court has repeatedly ad-

dressed, appellees recognize that the Court may grant plenary review regardless of the strength of the three-judge court's decision. In the event the Court prefers to engage in a more comprehensive examination, appellees provide the following overview of the case.

COUNTERSTATEMENT OF THE CASE

The Children's Internet Protection Act (CIPA) applies to every local library in the country that receives funds under two popular federal programs. J.S. App. 14a-16a.[1] CIPA requires libraries to install "technology protection measures" on all computers that provide Internet access, regardless of whether used by adults or minors, patrons or staff, or paid for by private or federal funds. 20 U.S.C. §9134(f)(1); 47 U.S.C. §254 (h)(6); J.S. App. 18a. The technology protection measure must operate "during any use of such computers." *Id.* It must prevent all adults and minors from accessing any "visual depictions" that are obscene or child pornography, and must also prevent minors from accessing images that are "harmful to minors." *Id.*

Two suits were filed in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of the statute, and were consolidated. The plaintiffs in this case (hereinafter "Multnomah plaintiffs") include large urban libraries serving Portland, Oregon and Santa Cruz, California; library systems serving rural and suburban communities in south central Wisconsin and Westchester County, New York; and state library associations in Connecticut, Maine, and Wisconsin. The Multnomah plaintiffs also include seven individuals who use their local libraries for Internet access. For example, plaintiff Emmalyn Rood used the Internet at her library in her early teens to "research issues relating to her sexual identity." J.S. App. 22a. Finally, the Multnomah plaintiffs include eight web sites that were blocked by major blocking programs even though they provided no information that was illegal. Two of the web sites are for political candidates. AfraidtoAsk.com and Planned Parenthood provide medical information about sex. PlanetOut provides information of interest to gay and lesbian communities. *Id.* at 22a-24a.

Pursuant to the statute, a special three-judge court was convened. After a period of discovery, the court held an eight-day trial at which it heard the testimony of twenty witnesses and admitted hundreds of exhibits, including depositions. J.S. App. 6a. On May 31, 2002, before the statute would have required libraries to install blocking programs, the three-judge court unanimously concluded that the statute was unconstitutional and enjoined its application. The court made "extensive findings of fact," *id.* at 7a, that consume almost one hundred pages in the Appendix to the Jurisdictional Statement. The government does not argue that any of these facts are clearly erroneous.[2]

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[1] CIPA modified three federal funding statutes: the Library Services and Technology Grants ProGram, 20 U.S.C. §9101 *et seq.*; the FCC-administered "e-rate" program, 47 U.S.C. §254(h); and the Elementary and Secondary Education Act, 20 U.S.C. §6801 *et seq*. This case is a challenge solely to the first two statutes and solely to the application of CIPA to public libraries. CIPA's provisions concerning schools are not at issue in this case.

[2] The government largely ignores the court's factual findings, citing instead contrary facts in congressional reports or portions of transcript testimony. The government also ignores two congressionally commissioned reports whose findings largely confirm those of the three-judge court. J.S. App. 94a, n.19; National Research Council, "Youth, Pornography, and the Internet," May, 2002; COPA Commission, "Final Report of the COPA Commission," October 20, 2000.

A. The Three-Judge Court's Findings Of Fact

1. Public Libraries and Internet Access

The three-judge court made a number of findings about the mission of public libraries and their provision of Internet access to the public. Libraries share a common mission to provide patrons with a wide range of information and ideas. J.S. App. 33a, 187a, n.36. They do so in part by applying professional standards to select books, tapes, and other materials for their collections, including materials that contain sexually explicit text and images. *Id.* at 33a, 34a.

Librarians also routinely provide patrons with access to materials not in their collections "through the use of bibliographic access tools and interlibrary loan programs." J.S. App. 34a. Through these programs, libraries provide materials that they have neither the space nor the funds to carry directly. Librarians do not apply selection criteria when using these methods; instead, they provide the patron with any resource they can obtain. *See* Cooper test. 3/25/02 at 94. Librarians are trained to use just about any means to assist a patron in obtaining information he or she seeks. J.S. App. 33a-34a. Increasingly, they turn to the Internet.

"The Internet vastly expands the amount of information available to patrons of public libraries." J.S. App. 36a. Approximately 95% of all public libraries now provide Internet access. *Id.* There is an enormous demand for the service. *Id.* "Public libraries play an important role in providing Internet access to citizens who would not otherwise possess it." *Id.* For many in lower income brackets, the library is their only source of access to the Internet. *Id.* at 36a-37a, 130a.

The court found that the provision of Internet access at public libraries is notably different than the selection of

materials for physical collections. J.S. App. 120a-127a. Through the Internet, librarians provide access to a vast range of Internet content regardless of its merit. J.S. App. 124a. They invite "patrons to access speech whose content has never been reviewed and recommended as particularly valuable by either a librarian or a third party to whom the library has delegated collection development decisions." *Id.* at 123a. Indeed, any "member of the public with Internet access could . . . tonight jot down a few musings on any subject under the sun and tomorrow those musings would become part of public libraries' online offerings and be available to any library patron who seeks them out." *Id.* at 124a-25a.

2. Internet Blocking Programs

Because Internet blocking programs are the only "technology protection measures" currently available for libraries to comply with CIPA, the three-judge court made extensive findings about their operation and efficacy. Internet blocking programs, or filters, are software products created and sold by private companies. These products categorize and then block speech on the Internet. For example, one well-known product, Websense, has created 30 categories ranging from "Abortion Advocacy" to "Job Search" to "Tasteless" and "Adult." J.S. App. 50-51a. "[N]o category definition used by filtering software companies is identical to CIPA's definitions . . . [and] there is no judicial involvement in the creation of the filtering software companies' category definitions." *Id.* at 51a.

The products search the Internet looking for web sites or pages they believe may fit into their categories. If they find a site and conclude that it does match their category, they place it into that category. If a library using the product chooses that blocking category, then any attempt to access a site in that category will be blocked. J.S. App.

52a. The sites placed in each category "are considered to be proprietary information, and hence are unavailable to customers or the general public for review, so that public libraries that select categories when implementing filtering software do not really know what they are blocking." *Id.* at 7a.

Although the statute only requires blocking of "visual depictions," none of the available products categorizes sites based solely on visual depictions and none blocks visual depictions without also blocking text. J.S. App. 56a, 93a. Neither judges nor professional librarians are involved in the products' decision to categorize and block particular web sites. *Id.* at 51a, 53a. "[F]iltering companies generally do not re-review the contents of that page or site unless they receive a request to do so, even though content on individual Web pages and sites changes constantly." *Id.* at 53a.

All of the parties agreed, and the court found, that all of the available products overblock, *i.e.*, they block sites that do not fit either the category definitions established by the companies or the differently (and more narrowly) defined statutory categories. J.S. App. 7a, 8a, 11a, 12a, 48a-94a.[3] Relying on expert testimony from both parties, the court found that "commercially available filtering programs erroneously block a huge amount of speech that is protected by the First Amendment." *Id.* at 91a. The court estimated the number of web pages blocked to be "at least tens of thousands." *Id.* at 93a.

Specifically, the court found that even defendants' expert identified "substantial" rates of overblocking and that his rates "greatly understate the actual rates of overblocking that occurs." J.S. App. 79a. That expert admitted that

[3] Similarly, underblocking is the failure to block sites that fit either the categories established by the products or the different categories established by the statute. J.S. App. 65a-67a.

library patrons across the country would be wrongly denied access to web content millions of times each year, even using his rate of overblocking. Finnell test, 4/1/01 at 175-59. In addition, plaintiffs' expert Benjamin Edelman testified about his study of overblocking, and submitted a CD-ROM that contained screen shots of over 4,000 documented examples. J.S. App. 79a-86a. Because Edelman's study also necessarily underestimates the amount of overblocking, the court found that "many times the number of pages that Edelman identified are erroneously blocked by one or more of the filtering programs." *Id.* at 85a-86a.

From evidence presented by both parties, the three-judge court gave dozens of examples of wrongly blocked sites ranging from religion sites (*e.g.*, Orphanage Emmanuel, a Christian orphanage in Honduras blocked by CyberPatrol as Adult/Sexually Explicit and the homepage of a Buddhist nun categorized as nudity by N2H2), to government sites (*e.g.*, a Danish anti-death penalty site categorized by N2H2 as pornography and a list of government web sites in Adams County, Pennsylvania categorized by Websense as sex), to sports sites (*e.g.*, the Sydney University Australian Football Club categorized by Smartfilter as Sex). J.S. App. 86-89a.

The court also concluded that all blocking programs *inevitably* overblock and underblock, and made lengthy findings in support of this conclusion. J.S. App. 48a-94a; 150a-51a. There is no "technology protection measure" that will do what the law requires without also blocking access to a vast amount of speech that is constitutionally protected for both adults and minors. *Id.* at 7a, 12a, 13a, 48a-94a. Relying in part on the expert testimony of Geoffrey Nunberg, the court found that "these failures spring from constraints on the technology of automated classification systems, and the limitations inherent in human review, including error, misjudgment, and scarce resources." *Id.* at 7a. "[I]t is currently impossible given the Internet's size,

rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech." *Id.* at 68a; 54a.

Specifically, the court found that "2 billion is a reasonable estimate of the number of Web pages that can be reached, in theory, by standard search engines" J.S. App. 30a, and that it is growing at a rate of 1.5 million pages per day. *Id.* The court also found that perhaps "two to ten times" the number of web pages accessible to search engines are accessible through other means such as identification in email. *Id.* and 29a. "Web pages and sites are constantly being removed, or changing their content . . . Individual web pages have an average life span of approximately 90 days." *Id.* Obviously, no company can review all of this content. *See, e.g., id.* at 60a. These constraints lead blocking companies to cut corners when categorizing web sites, inevitably causing substantial overblocking and underblocking. *Id.* at 48a-94a.

The court also made findings about the feasibility of unblocking sites wrongly blocked by the programs, and the effect of requiring patrons to seek permission to access blocked sites. CIPA allows, but does not require, libraries to unblock sites upon the request of an adult patron with a "bona fide research or other lawful purpose." 20 U.S.C. §9134 (f)(3); 47 U.S.C. §254(h)(6)(D).[4] All of the available products offer a method for doing some unblocking. J.S. App. 46a. In Tacoma, Washington, in which a librarian not only handles unblocking requests but searches on his own for errors, defendants' expert found there was still substantial overblocking. J.S. App. 46a, 72a. Even when sites were unblocked, the process took "between 24 hours and a

[4] Under the primary funding scheme, minors cannot request unblocking; under the other scheme, they can. J.S. App. 168a, n.33.

week." *Id.* at 46a. "None of these libraries [proffered by the government] makes differential unblocking decisions based on the patrons' age. Unblocking decisions are usually made identically for adults and minors. Unblocking decisions even for adults are usually based on suitability of the Web site for minors." *Id.* at 47a. The government failed to prove that any product was capable of unblocking for adults but not minors, for one patron only (as opposed to all patrons), or for only a specified time period based on a particular patron's need. Edelman test, 4/2/02 at 64-67.

Even assuming that unblocking according to the statute is feasible, the court found that "many patrons are reluctant or unwilling to ask librarians to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic." J.S. App. 47a, 172a-173a. For example, plaintiff Emmalyn Rood testified "that she would have been unwilling as a young teen to ask a librarian to disable filtering software so that she could view materials concerning gay and lesbian issues." J.S. App. 47a. The court found that "[t]he pattern of patron requests to unblock specific URLs in the various libraries involved in this case" also confirmed that "patrons are largely unwilling to make unblocking requests unless they are permitted to do so anonymously." *Id.* For example, defendants' expert testified that the Greenville Public Library in South Carolina wrongly blocked close to a hundred sites in a two-week period (a serious underestimate of actual overblocking, as the court found), but the library has received only 28 unblocking requests in almost two years. *Id.* at 47a, 73a.1.4

3. Alternative Methods For Avoiding Unwanted Internet Content At Libraries

Prior to the hammerlock imposed by CIPA, more than 90% of public libraries had exercised their local discretion

not to require the use of blocking programs, in part because of its deficiencies. J.S. App. 3a, 45a. Many also view the requirement that they censor speech as fundamentally inconsistent with the mission of libraries. Instead, as the three-judge court found, libraries have developed a variety of methods for assisting patrons in finding the content they want and avoiding unwanted content, including sexual material. *Id.* at 41a-48a. These methods include the optional use of blocking programs, training in Internet searches, and lists of recommended sites. *Id.* at 41a, 45a. For patrons (or staff) that are concerned about walking by a computer terminal when another patron is viewing material considered offensive, libraries offer devices such as privacy screens, or configure their computers to minimize that possibility. *Id.* at 43a-44a. Virtually all libraries have "acceptable use" policies that govern patron use of the computers. *Id.* at 37a. Finally, librarians can and do, of course, call law enforcement when appropriate. *Id.* at 159a.

B. The Three-Judge Court's Legal Analysis

In its legal analysis, the three-judge court held that CIPA was unconstitutional because it induces libraries "to engage in activities that would themselves be unconstitutional." J.S. App. 97a. The court analogized to the public forum doctrine, finding that "[a]lthough a public library's provision of Internet access does not resemble the conventional notion of a forum as a well-defined physical space, the same First Amendment standards apply." *Id.* at 108 (citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)). More specifically, the court found that strict scrutiny applies because blocking programs single out disfavored speech for exclusion based on content in a forum otherwise designated for unrestricted expressive activity on a wide range of topics. J.S. App. 118a.

Although the court found that the state would have a compelling interest in preventing access to illegal speech, the government had to prove that CIPA's blocking mandate "is narrowly tailored to further those interests, and that no less restrictive means of promoting those interests exists." J.S. App. 148a. "Given the substantial amount of constitutionally protected speech blocked by filters studied," the court concluded that CIPA was "not narrowly tailored." *Id.* at 149. The court also held that "there are plausible, less restrictive alternatives to the use of software filters that would serve the government's interest." *Id.* at 158. Finally, the court concluded that the disabling provisions of CIPA did not cure its unconstitutionality. "[T]he content-based burden that the library's use of software filters places on patrons' access to speech suffers from the same constitutional deficiencies as a complete ban on patrons' access to speech that was erroneously blocked by filters, since patrons will often be deterred from asking the library to unblock a site and patron requests cannot be immediately reviewed." *Id.* at 176a.

ARGUMENT

I. The Three-Judge Court's Injunction Should Be Affirmed Because CIPA Induces Public Libraries To Violate The First Amendment

As the three-judge court recognized, "[t]he legal context in which this extensive factual record is set is complex," and "[t]here are a number of potential entry points into the analysis." J.S. App. 9a. Put most simply, even the government concedes that Congress may not use its spending authority "to induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). Regardless of which form the legal analysis takes from there, CIPA's scheme clearly violates that standard.

A. CIPA's Content-Based Restriction On Speech Fails Strict Scrutiny

By its terms and effect, CIPA imposes a content-based restriction on speech. Because of the nature of Internet access in public libraries, the three-judge court correctly held that CIPA is subject to strict scrutiny. J.S. App. 138a. The three-judge court aptly compared Internet access at public libraries to traditional public fora like sidewalks and parks that "promote First Amendment values." *Id.* at 129a. The court also drew certain principles from this Court's unconstitutional conditions cases,[5] and noted that "the more narrow the range of speech that the government chooses to subsidize (whether directly, through government grants or other funding, or indirectly, through the creation of a public forum) the more deference the First Amendment accords the government in drawing content-based distinctions." *Id.* at 112a. Conversely, "where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored." *Id.* at 118a.

Applying these principles to this case, the court

[5] Although the three-judge court did not rule on plaintiffs' unconstitutional conditions claim, it included a lengthy footnote analyzing the relevant cases. Noting that "the First Amendment is not phrased in terms of who holds the right, but rather what is protected," J.S. App. at 183a n.36, the court opined that plaintiffs may have a valid unconstitutional conditions claim based on the First Amendment rights of either public libraries or their patrons. *Id.* at 188a n.36. The Court also noted that "[b]y interfering with public libraries' discretion to make available to patrons as wide a range of constitutionally protected speech as possible, the federal government is arguably distorting the usual functioning of public libraries as places of freewheeling inquiry." *Id.* at 187a n.36 (citing *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

properly placed public library Internet access at the most speech-protective end of the scale. "The unique speech-enhancing character of Internet use in public libraries derives from the openness of the public library to any member of the public seeking to receive information, and the openness of the Internet to any member of the public who wishes to speak." *Id.* at 135a-136a. When public libraries provide Internet access, they "create[] a forum for the facilitation of speech, almost none of which either the library's collection development staff or even the filtering companies have ever reviewed." *Id.* at 125a. By forcing libraries to use blocking programs, CIPA "risk[s] fundamentally distorting the unique marketplace of ideas that public libraries create when they open their collections, via the Internet, to the speech of millions of individuals around the world on a virtually limitless number of subjects." *Id.* at 126a.

Because CIPA is properly subject to strict scrutiny, it is presumptively invalid, and must be struck down unless the government can prove it is narrowly tailored to serve a compelling government interest. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989)); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997). As the three-judge court's detailed findings clearly establish, CIPA suppresses a vast amount of Internet content and is far from narrowly tailored to serve the government's interest in prohibiting access to illegal images. Blocking programs "block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." J.S. App. 148a-149a. This evidence "significantly underestimate[s] the amount of speech that filters erroneously block." *Id.* at 149a. As the defendants' own expert conceded, the programs block content that does not

even meet "the filtering products' own definitions of sexually explicit content, let alone the legal definitions of obscenity or child pornography." *Id.* Indeed, given the fundamental flaws of blocking programs, the court found that any public library's use of blocking programs will fail to be narrowly tailored. "[A]ny technology protection measure that blocks a sufficient amount of speech to comply with CIPA . . . will necessarily block substantial amounts of speech that does not fall within these categories." *Id.* at 151a.

Government-mandated blocking programs are blunt instruments in an area that requires far more sensitive tools. "The First Amendment requires the precision of a scalpel, not a sledgehammer." J.S. App. 156a. As this Court has explained, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." *Playboy*, 529 U.S. at 817-18 (internal quotation marks and citation omitted).

Especially given the breadth of CIPA's impact on protected speech, the government clearly failed to meet its "heavy burden . . . to explain why a less restrictive provision would not be as effective as [CIPA]." *Reno*, 521 U.S. at 879. As the three-judge court found, a number of alternative methods further the government's stated interests in a manner far less burdensome on protected speech than the mandatory use of blocking programs for all adults and all minors regardless of age. J.S. App. 157a-167a. These alternatives -- currently used by the vast majority of public libraries nationwide -- include the *optional* use of blocking software; policies under which parents decide whether their children will use terminals with blocking software; the use of blocking software only for younger children; enforcement of local Internet use policies; training in Internet usage; steering patrons to sites selected by librarians; installation of

privacy screens or recessed monitors; and the segregation of unblocked computers or placing unblocked computers in well-trafficked areas. *Id.*

Rather than grapple with the overwhelming evidence against them, the government argues that the First Amendment is practically irrelevant to this case because CIPA is akin to a library's traditional collection decisions. Govt. J.S. at 16-20. This analysis is flawed in numerous ways. First, CIPA federally *mandates* blocking for all libraries and all users, and is thus a far cry from a library's exercise of its own editorial judgment. Second, the specific findings of the three-judge court refute the governments' proposed analogy between Internet access and book selection decisions. When public libraries provide patrons with Internet access, they allow any member of the public to receive speech "from anyone around the world who wishes to disseminate information over the Internet." J.S. App. 137a-138a. Unlike decisions to include books in their print collections, when offering Internet access librarians do not exercise editorial discretion and select only pre-approved speech for inclusion. Even libraries that filter Internet access have no control over the vast amount of unfiltered content still made available, and have no clue what web sites the program blocks. *Id.* at 7a; 125a. Third, the government argues that the three-judge court's approach must be wrong because it "would risk transforming the role of public libraries in our society." In fact, it is CIPA that risks changing librarians from information providers into censors. CIPA forces libraries to install filters that, out of the "vast democratic forum" of the Internet, "single out for exclusion particular speech on the basis of its disfavored content." *Id.* at 138a. Such a mandate, under all of the relevant law, is clearly subject to and fails strict scrutiny.[6]

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[6] CIPA would clearly fail constitutional scrutiny even under rational (continued...)

B. The Disabling Provisions Fail To Cure CIPA's Defects

The three-judge court rightly held that CIPA's disabling provisions do not cure its constitutional defects. J.S. App. 167a-177a. Even assuming the broadest possible interpretation of those provisions, "the "requirement that library patrons ask a state actor's permission to access disfavored content violates the First Amendment." *Id.* at 170a. This Court has struck down numerous content-based restrictions that require recipients to identify themselves before being granted the right to access or communicate disfavored speech. *See, e.g., Lamont v. Postmaster General*, 381 U.S. 301 (1965)(invalidating federal statute requiring postmaster to halt delivery of communist propaganda absent affirmative request); *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996)(striking down federal law requiring cable users to request sexually explicit programming in writing); *Playboy, Inc.*, 529 U.S. 803 (invalidating law requiring cable users to request access to scrambled sexually explicit programming). As this Court explained just last term, "It is offensive -- not only to the values protected by the First Amendment, but to the very notion of a free society -- that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, ___ U.S. ___, 122 S.Ct. 2080, 2089 (2002)(striking down local ordinance that prohibited door-to-door canvassers from "promoting any cause" without first

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[6] (...continued)
basis review. There may be no better example of irrationality than mandated government use of a product that secretly categorizes and blocks a huge amount of speech that comes nowhere close to the type of content the law was intended to restrict.

obtaining a permit). It is equally offensive that a citizen must obtain government approval before accessing protected speech on the Internet in her public library.

As the three-judge court noted, the deterrent effect of the disabling provisions is "a matter of common sense as well as amply borne out by the trial record." J.S. App. 172a. For example, plaintiff Emma Rood testified that as a gay teen she would have been unwilling to ask a librarian to disable blocking programs so that she could research issues related to her sexual identity. *Id.* Plaintiff Mark Brown would have been equally embarrassed to ask a librarian to unblock sites when he was researching his mother's breast cancer. *Id.* Significantly, the three-judge court found that the reluctance of patrons to request unblocking is also established "by the low number of patron unblocking requests, relative to the number of erroneously blocked Web sites, in those public libraries that use software filters and permit patrons to request access to incorrectly blocked Web sites." *Id.* at 173a. Given the content-based burden the disabling provision imposes on protected speech, and its strong deterrent effect, the provision "fail[s] to cure CIPA's lack of narrow tailoring." *Id.* at 177a; *see also Playboy*, 529 U.S. at 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree").

C. CIPA Imposes A Prior Restraint On Speech

CIPA's blocking mandate also imposes an unlawful prior restraint by effectively silencing speech prior to its dissemination in public libraries, without judicial determination or even the semblance of First Amendment due process. The only other court to consider the constitutionality of mandatory Internet blocking at a public library invalidated the practice for this reason. *See Mainstream Loudoun v. Board of Trustees of Loudoun County*, 24

F.Supp.2d 552, 570 (E.D.Va. 1998)(because mandatory blocking policy "has neither adequate standards nor adequate procedural safeguards," it is an unconstitutional prior restraint). By mandating the use of blocking programs that block speech that is not even close to the line between protected and unprotected speech, CIPA imposes a classic system of prior restraint which presumptively violates the Constitution. *See Near v. Minnesota*, 283 U.S. 697, 713 (1931)("the chief purpose of the [First Amendment] is to prevent previous restraints upon publication"). Blocking programs function literally as automated censors, blocking speech in advance of any judicial determination that it is unprotected. They arbitrarily and irrationally block thousands of web pages that are fully protected. In this Court's words, "[t]his is . . . the essence of censorship." *Id.* at 713.

A postmaster who opened all letters and refused to deliver letters with the word "sex" in them would clearly be violating the First Amendment's rule against prior restraints. *See Blount v. Rizzi*, 400 U.S. 410 (1971)(striking down statute that allowed Postmaster General to halt use of mail for commerce in allegedly obscene materials). As the Court has explained, "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." *Id.* at 416 (citations omitted). Similarly, having chosen to fund Internet access, the government "may not thereafter selectively restrict certain categories of Internet speech because it disfavors their content." *See Mainstream Loudoun v. Board of Trustees of Loudoun County*, 2 F.Supp.2d 783, 795-96 (E.D.Va. 1998).

"[A]ny system of prior restraints of expression comes to [the court] bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)(morality commission, whose purpose was to

recommend prosecution of obscenity, imposed unconstitutional prior restraint by sending notices to booksellers that certain books were objectionable); *see also Southeastern Promotions v. Conrad*, 420 U.S. 546, 559 (1975)(municipal board's denial of permission for performance of the rock musical "Hair" at a city auditorium, because of reports that the musical was "obscene," was an unconstitutional prior restraint); *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228, 230 (4th Cir. 1970)(invalidating as "unconstitutional prior administrative restraint" a sheriff's practice of seizing and terminating exhibition of R-rated movies).

By delegating the authority to restrict speech to third-party, non-governmental actors who will not reveal what they are censoring, moreover, CIPA confounds the constitutional infirmities inherent in any prior restraint. There is no question that the decisions of blocking programs "to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned." *Bantam Books*, 372 U.S. at 70. CIPA's disabling provisions inflict further First Amendment injury by vesting librarians with unbridled discretion to undo selectively the blocking companies' censorship decisions. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992)("The First Amendment prohibits the vesting of such unbridled discretion in a government official"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" is unconstitutional absent "narrow, objective, and definite standards to guide the licensing authority"). CIPA's censorship system comes nowhere close to the judicial review that is required when First Amendment rights are at stake. *Freedman v. Maryland*, 380 U.S. 51 (1965).

CONCLUSION

For the reasons stated above, the judgment below was plainly correct and warrants summary affirmance. However, because the case presents First Amendment issues of national importance, appellees do not oppose the government's request for plenary review.

Respectfully submitted,

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